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No. 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Appeal from the Supreme Court of Ohio

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Appellant.

vs.

SANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OF APPELLEE

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Appellee.

BRIEF OF APPELLEE

QUESTIONS PRESENTED

1. Does Article I, Section 10, Clause 2, of the Constitution of the United States, prohibit state taxation of tangible personal property after the imported property has reached its destination, been put to the use for which it was imported, and lost its identity as an import?

2. Does the proviso contained in Section 5701.08, Revised Code of Ohio, granting exemption from personal property taxation to property of nonresidents of Ohio held in a storage warehouse for storage only, deny appellant equal protection of the laws under the Constitution of the United States?

3. If the appellant is denied equal protection of the laws under the Constitution of the United States, to what relief, if any, is the appellant entitled?

STATEMENT OF THE CASE

The facts of the case have been stipulated (R. 33-36).

The appellant is a resident corporation engaged in the business of manufacturing iron and steel.

Appellant held certain domestic iron ore and raw materials for use in manufacturing and certain finished products for ultimate sale. The Tax Commissioner of Ohio held these properties subject to the Ohio personal property tax despite appellant's claim that the levy against them was unconstitutional on the basis of discrimination in that nonresidents holding such property in a storage warehouse for storage only were not required to pay the tax. The Ohio Supreme Court ultimately upheld the Tax Commissioner's action.

Additionally, appellant imported five grades of foreign iron ore for use in its manufacturing processes. These ores were stock-piled on appellant's premises in five separate piles. As need arose for a particular grade of ore it was removed from its stock pile for use in the manufacturing processes. As an additional shipment of a particular grade of ore was received, it was placed upon and commingled with the existing stock pile of that grade of ore. The Tax Commissioner determined that these foreign ores had lost identity as imports due to the breaking of import units and the commingling of the ores with domesticated property. This action was likewise affirmed by the Supreme Court of Ohio.

SUMMARY OF ARGUMENT

IMPORTS

1. Article I, Section 10, Clause 2, of the Constitution of the United States as interpreted in *Brown* v. *Maryland*, 12 Wheat., 419, and *The License Cases*, 5 How., 504, protects imports from state taxation only so long as they retain their character as such.

2. An import which has reached its destination, has been commingled with the general mass of property in a state and has been put to the use for which imported is not protected from state taxation by Article I, Section 10, Clause 2, of the Constitution of the United States.

3. When a point is reached at which an import can no longer be identified as such, it has become part of the general mass of property in the state and subject to state taxation.

EQUAL PROTECTION

1. Classification for purposes of taxation is a legislative function. If a reasonable basis for the classification exists, it does not lead to denial of equal protection of the laws.

2. If the exemption of property owned by a nonresident and held in a storage warehouse for storage only results in discrimination against the appellant, the only method of reestablishing equality of taxation is to strike the entire proviso granting the exemption to nonresidents since the phrase "belonging to a nonresident" is not separable from the proviso.

3. The Supreme Court of Ohio was correct in refusing to accept appellant's claim because, if the appellant was

correct in its argument that the exemption granted to nonresidents denied appellant equal protection of the laws, proper rules of statutory construction require that only separable portions of a statute which are unconstitutional may be stricken and that the Court should uphold valid provisions which are separable from the unconstitutional portions; the phrase "belonging to a nonresident" is not a separable portion but is rather an integral part of a proviso. Thus, if the entire proviso be stricken, nonresidents will no longer be afforded exemption and further equal treatment will be granted to all taxpayers.

ARGUMENT

I.

IMPORTS

Personal property is made subject to taxation in Section 5709.01, Revised Code of Ohio, as follows:

> "* * * All personal property located and used in business in this state * * * are subject to taxation, regardless of the residence of the owners thereof. * * *"

Section 5711.01, Revised Code of Ohio, defining that property which must be listed for purposes of taxation, reads in part:

> "(A) 'Taxable property' includes all the kinds of property, except real property, mentioned in sections 5709.01 and 5709.02 of the Revised Code * * *"

Section 5701.03, Revised Code of Ohio, defines personal property:

> "* * * 'personal property' includes every tangible thing which is the subject of ownership, whether animate or inanimate * * *"

Thus the appellant's imported iron ores stored at the plant sites of the appellant for use in the appellant's open hearth furnaces or blast furnaces are personal property subject to taxation by the state unless otherwise privileged.

This appeal is concerned with the constitutional immunity provided in Article I, Section 10, of the Constitution of the United States, as follows:

> "* * * * * * * * *
>
> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; * * *"

The constitutional question occasioned by this provision, and the real problem created, is well expressed in the leading case on this subject, *Brown, et al.*, v. *The State of Maryland*, 12 Wheat., 419, 6 L.Ed., 678. Chief Justice Marshall delivered the opinion of the court, and spoke in part as follows at page 441-686:

> "The constitutional prohibition of the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colours between white and black, approach so nearly as to perplex the understanding as colours perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."

It is the position of the Tax Commissioner of Ohio that the imported iron ores in question could no longer be described as imports because of the manner in which they have been acted upon by the importer. All of the ores are transported by railroad car from the port of entry into this country to the plant locations near Youngstown. Upon arrival, the cars are routed to the storage yard where they are unloaded. The ores are placed in piles separated as

to origin. These piles are not intermingled; however, ores of the same origin are placed in the same pile from which the withdrawal for use is made, so that a particular type of ore will be placed upon a pile of the same type which was previously imported. These ores are drawn upon as needed for use in appellant's blast furnaces or open hearth furnaces.

The imported ores have thus reached a final destination and have been made available for fulfillment of the purpose for which imported. Withdrawals for use are not made from a particular shipment but from a commingled pile. The ultimate issue presented is then whether such use constitutes a mixture or commingling with the mass of property in the state so as to make such ores lose their character as an import and thus subject the ores to state taxation.

The stipulation contained herein (R. 33-36) clearly indicates that by the method of storage, and day to day use, the bulk has been broken. There is no conceivable way that the individual bulk imports could be distinguished or identified as to the shipment delivered, and the appellant makes no pretense of using ores from any particular shipment.

The bulk imports here under consideration fall on the nether side of the line of demarcation marked by Chief Justice Marshall in *Brown* v. *Maryland*. These stock piles of ores have throughout the years been altered by an admixture of new ores and substantial withdrawals of ores for use in manufacturing.

The ad valorem tax upon the ores here concerned is not levied against a shipment of imported ore which is segregated apart from other ores and held for some future use. This tax is levied against ores in a common stock pile which are clearly in the language of Section 5701.08, Revised Code of Ohio, "* * * utilized in connection with ordinary * * * operations, * * * or when stored or kept on hand

as material * * *." Reason will show that no danger accrues to foreign commerce from such a tax, and, in fact, to hold such items privileged from the tax is to *grant* economic benefit to the import completely outside of the intent of the Constitution. These items are similarly situated with domestic items, and are accorded the same benefits or protection of the state; it must surely follow that the items, although coming from foreign commerce, should bear their fair share of the tax burden. This tax is not imposed upon goods *in transitu* but upon goods *located and used in business* in Ohio, Sections 5709.01 and 5701.08, Revised Code of Ohio.

The conclusion of the Supreme Court of Ohio is contained on page 126 of the official report, 166 Ohio St., 122, and reads:

> "If, pursuant to Clause 2 of Section 10 of Article I of the Constitution of the United States, the same protection from state taxes can be accorded to an imported fungible commodity such as iron ore as is accorded to goods imported in a package, we do not believe that such protection can extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place, and (2) after portions of such iron ore have been removed for use in manufacturing."

While the Ohio court's conclusion seems to question the applicability of the import clause to bulk imports, its determination is none the less sound, based as it is upon the use to which the imported property is put. Thus, the Ohio court concluded that the protection of the import clause could not extend to property after it had been commingled with other property in the state and thus made a part of the general mass of property within the state and after the identity of the import had been destroyed by such com-

mingling and removal of portions of it for use in manufacturing.

All of the cases dealing with the problem of the importation of goods from foreign lands recognize that there is a point beyond which the protection of the import clause does not exist. The Ohio court attempted to define its interpretation of that point. The imports in question were at one time within the stream of foreign commerce. They were likewise at one time within the stream of interstate commerce. However, the Ohio tax has been assessed upon the property after it has been removed from the stream of commerce, after the importer has so acted upon the property that it has lost its quality as an import and after it has been incorporated into the mass of property within the state. Only an artificial construction of the import clause could exempt such property from an ad valorem state tax.

Throughout all these cases runs the recognition that there exists or may exist a point at which the constitutional immunity ceases. Likewise, in each of these cases the court has attempted to locate that point preliminary to determining the applicability of the import clause.

In the case of *May* v. *New Orleans*, 178 U.S., 496, 44 L.Ed., 1165, 20 S.Ct., 976, the problem presented involved the importation of small packages contained within a single large package. The court identified the original package as the large container and held that when the large container was opened for sale or delivery the many small packages contained therein became subject to state taxation. This holding was based upon the conclusion that the importer had so acted upon the thing imported that each parcel of the goods had lost its distinctive character as an import.

The Supreme Court of Washington in *Washington Chocolate Company* v. *King County*, 21 Wash. 2d, 630, 152 P. 2d, 981, outlined three tests for use in determining whether imports have lost identity as such. The second paragraph of the syllabus in that case states:

> "Imported merchandise loses its constitutional immunity from state taxation (1) when it is no longer in the original package; (2) when the importer has so acted upon it that it has lost its character as an import and has become a part of the general mass of property in the state; and (3) when it has been sold by the original importer to a purchaser, even though it remains in the original package."

As to test 1, we believe that the facts of this case indicate that by commingling and withdrawing the iron ore any original package concept has been removed since by the use put to the property it is no longer in its original form, shape or package. As to test 2, we believe that the facts indicate that by the appellant's acts of stockpiling the imported ore on piles of previously imported ores and of indiscriminately withdrawing for use portions of the last created stock pile, the "importer has so acted upon it that it has lost its character as an import and has become a part of the general mass of property in the state." As to test 3, the iron ore was not imported for sale but was imported for use. The iron ore has been subjected to the use for which it was imported.

In the case of *Southern Pacific Company* v. *City of Calexico*, 288 F., 634,, cotton which was produced, ginned and baled in Mexico was imported into California, destined for transshipment to England. Local authorities sought to tax the property. The court at page 642 identified the controlling question presented as: "Was the property kept segregated from the general mass of property in the state

in such a way that it could always be identified, and not subjected to any beneficial use?"

The California case of *Stanton* v. *Los Angeles County*, 177 P. 2d, 804, bears a close analogy to the instant fact situation. In the *Stanton* case lumber was imported in bulk. Lumber of different shipments was kept separated from other shipments except that subsequent shipments of the same type of lumber were commingled. The court held that while the segregation of the shipments did not destroy the import character, the sale of any part of the whole broke the package. The court reasoned that although the lumber might arrive at the dock without cover, nevertheless the shipment of such articles constitutes the original form or the original package. The court went on to state that the phrase "original package" refers to the unit transported by the shipper and delivered in the exact condition in which shipped. At pages 807 and 808 the court stated:

> "From the authorities above quoted the conclusion is irresistible that the unit of importation is the original package; that such unit only and not its constituent elements is within the exclusive federal jurisdiction. Although a cargo in bulk may arrive at the port of entry in irons, or wrapped and tied with hemp ropes, or encircled with a silken thread or, as a heard of steers, have no binder at all, yet the entire shipment without regard to its exterior wrapper is the original package. A cargo of planks, timbers or logs imported from foreign lands is surrounded by the invisible gossamer woven of law, custom and convention which protects the merchandise from the local tax assessor only so long as it retains the unbroken wrapper in which it entered the port. But when such cargo sheds its invisible cover, even though in the warehouse of the importer, and is so sorted and classified as to facilitate its sale, and portions thereof are sold until the pile is depleted and the remnants thereof are commingled with new shipments of the same type of timbers, also to be offered for sale, then a reasonable construction of section 10 and the decisions which have interpreted

its meaning compel the termination of immunity from local taxation of such broken lots and commingled remnants of imported lumber."

In *Mexican Petroleum Corporation* v. *City of South Portland*, 121 Me., 128, the court subjected to state taxation oil which was pumped from a ship into tanks on shore. In determining the application of the import clause to the oil, the court examined the question of whether the integrity of the import package had been preserved and found that it had not. Thus, through all these cases it can be seen that the court made examination as to what constituted the original package. The court determined whether or not that original package had been broken so as to make the remainder a part of the mass of property in the state.

It is the position of the Tax Commissioner that the import clause was never intended nor can it properly be applied to protect an import which has reached its destination, been commingled with other import shipments so that the identity of the import has been lost, or been changed in extent by the removal of part of the import for use in manufacturing.

CONCLUSION

Since the imported iron ore in question has lost its identity as an import by reason of the use to which it has been put, it is concluded that the constitutional immunity of the import clause can no longer be applied to the property; that the decision of the Supreme Court of Ohio was correct and should be affirmed.

II.

EQUAL PROTECTION

All that has been said in the companion case of Allied Stores of Ohio, Inc., v. Bowers on the question of discrimination as to merchandise held in a storage warehouse or denial of equal protection of the laws is incorporated herein as though fully restated.

Respectfully submitted,

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